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IN THE HIGH COURT OF DELHI AT NEW DELHI

CP NO 41 of 2004

DATE OF DECISION : 09 .05.2005

IN THE MATTER OF :

M/S NEHRU PLACE HOTELS LIMITED. PETITIONER

Through Mr.Jayant Bhushan, Sr. Advocate with
Ms.Veronica Mohan, Advocate.

Versus

M/S BHUSHAN STEEL & STRIPS LIMITED RESPONDENT

Through Mr.Anil Airi, Advocate.

CORAM :-

THE HON'BLE MR.JUSTICE A.K.SIKRI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

For detailed judgment, see **CP No.40/2004.**

May 9 ,2005.
mk

(A.K. SIKRI)
JUDGE

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CP Nos. 40 & 41 of 2004

DATE OF DECISION : 9.05.2005

IN THE MATTER OF :

M/S NEHRU PLACE HOTELS LIMITED. PETITIONER
Through Mr.Jayant Bhushan, Sr. Advocate
with Ms.Veronica Mohan, Advocate.

Versus

M/S BHUSHAN LIMITED RESPONDENT IN CP No.40/2004
M/S BHUSHAN STEEL & STRIPS LIMITED RESPONDENT IN CP NO.41/2004
Through Mr.Anil Airi, Advocate

CORAM :-

THE HON'BLE MR.JUSTICE A.K.SIKRI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

A.K. SIKRI, J.

These petitions, though for winding up of the respondent company (hereinafter referred as `the company'), raise interesting and, at the same time, important questions. There is a decree passed by this court in a civil suit which is based on compromise/settlement between the

parties. The company now refuses to make payment in terms of the said decree and dubs this agreement as contrary to the mandatory provisions of Delhi Apartment Ownership Act,1986 as well as against public policy. The company also states that the decree is a nullity and cannot be enforced and, therefore, it cannot be said that any "debt" is payable by the company to the petitioner in terms of the said decree. Whether the Company Court can raise all these issues in these proceedings is a moot question?

2. We may take note of the relevant facts in some detail in order to appreciate the controversy between the parties.

3. The petitioner is in the hotel business. One of its hotels is known as Park Royal Hotel, which is located at Nehru Place, New Delhi. Adjacent to this hotel, the petitioner has also built International Trade Tower. It houses various commercial establishments as space is sold to such establishments by the petitioner. The company had also entered into a Lease Agreement dated 16th April, 1993 and Agreement dated 17th April, 1993 whereby the petitioner was to eventually sell, transfer and convey the title of flats No.109,110,11 and 112, altogether admeasuring 4000 sq. ft. built up area, situated in Block-F, 1st

Floor of this trade tower to the company. The company also acquired an irrevocable right to use parking spaces No.17, 18, 19 and 20 vide a Space Buyers Agreement. Subsequently the company entered into a Space Buyers Agreement with the petitioner on 17th December, 1997 in terms of which the aforesaid flats were purchased by the company along with the aforementioned parking spaces. The company paid the entire sale consideration as per the said Space Buyers Agreement (for short` the Agreement'). However, this Agreement also contained Clause 2(c) as per which `recurring charge' was also to be borne by the company. This recurring charge is defined in Clause 2 (c) as under:

> " **2 (c) Recurring Charge** shall mean those amounts which are agreed to be paid and borne by the Space Buyer in future, that is, after the date of handing over possession and shall include:
>
> (v) consideration for any common area, common facility, amenity or advantage not herein specified but subsequently agreed in writing to be made available to the Space Buyer by the Company to which the Space Buyer may be found to be entitled or may become entitled under any law, rule, judgment or decree of any court;
>
> (vi) further agreed maintenance charges and contribution to sinking/capital replacement fund;

(vii) further agreed maintenance charges for running & maintenance of the Air-conditioning plant and contribution to sinking/capital replacement fund. (This would be applicable for such spaces where the air-conditioning facility is also agreed to be provided).

(viii) amount due from Space in lieu of Ground Rent as specified in this Agreement from the date of execution of this Agreement."

4. In terms of Clause 10 of this Agreement, the company is also liable to pay the petitioner, the insurance premium of the apartment in proportion to the area sold to the company. Clause 25 of the Agreement further stipulates that the company would pay maintenance charges at the rate of Rs.490.96 paise per parking space per month for parking spaces No.17, 18, 19 and 20. This amount is payable on half yearly basis and the amount is liable to be increased annually on the basis of Living Index issued by the Delhi Administration. Clause 14 of the Agreement sets out all the payments which are to be borne by the company. This Clause is in the following terms:

" **Clause 14 (a).** From the date of this Agreement, the Space Buyer would be liable to pay regularly maintenance and service charges for common areas and for the consumption of electricity and water in the

common area.

(b) In respect the spaces which are air-conditioned, the Space Buyer would be liable to pay the Company all charges such as for the consumption of electric and water and other consumables for the running of air-conditioning, plant, as well as for its repairs, maintenance, administrative expenses and management charges of the Company which are included in the Maintenance charges stipulated in Annexure.

(c) The Space Buyer would be liable to pay annually the sinking fund for the replacement of capital goods like air-conditioning plant, generators, machinery, electrical equipments, cables ducting, transformers, pumping-sets, fire fighting equipment, water-mains, toilets, ventilation equipments, lifts, escalators, etc.etc.the rate/s of sinking fund as payable would be worked out separately for air-conditioned areas and non air-conditioned areas.

(d) That the rate/s of general Maintenance charges for common services, insurance and sinking fund for replacement of capital goods for the calendar year 1997 have been fixed on the basis of Living Index Points as issued by Delhi Administration in December, 1996. The above charges will be subject to annual increase in proportion to the rate of inflation to cover the increased cost of maintenance/materials expenses etc. The annual inflation/increase will be assessed on the basis of the increase in points of Living Index as regularly issued by the Delhi Administration from time to time. The percentage of increase will be the same as the percentage of increase in the points of Living Index. Minimum increase annually would be 9 percent on the

last paid charges. The charges will be revised in the month of July every year on the basis of Living Index as issued by Delhi Administration 31st December of previous year and would normally be applicable for one year.

(e) The payments towards the sinking fund would be payable annually in advance and charges for maintenance of the common services and for Air conditioning plant (wherever applicable) would be payable within six monthly in advance.

(f) The company at no point of time has to render any account to the Space Buyer for the actual expenses incurred by the Company."

5. The Agreement also provides that all dues and charges are to be paid within 15 days of their becoming due and in case of non-payment of the "recurring charges" within stipulated time, interest at the rate of 24 per cent per annum with quarterly rates would be payable.

6. Some disputes arose between the parties regarding payment of these recurring charges. The company filed suit against the petitioner being Suit No.1639/1994. The petitioner also filed Suit No.1513/1995 against the company. Both these suits were filed in this court.

7. During the pendency of these suits, the parties arrived at a settlement in terms of compromise deed dated 17th December, 1997. By

this compromise, the petitioner withdrew its action of cancellation of the Lease Agreement. It was also recorded that the petitioner had received full consideration of Rs.1.68 crores as sale consideration for the flats/spaces in question. In respect of recurring charges/maintenance charges, following clauses were incorporated in the compromise deed:

> "7. At the time of recording of this Compromise Agreement in Court BIL shall pay to NPHL a sum of Rs.22,47,302/- (Rupees twenty two lakhs fourty seven thousand three hundred and two only) in full and final settlement of NPHL's claim for maintenance charges, car parking charges, electricity and water charges in respect of the Apartments for the period prior to 30.6.97 and advance for the period 1.7.97 to 31.12.97.
>
> 8. With effect from 1st July, 1997 BIL shall be liable to pay to NPHL maintenance charges for the Apartments at the rate of Rs.29.03 (Rupees Twenty Nine and paise Three only) per square foot i.e. Rs.1,16,120/- (Rupees one lac sixteen thousand one hundred and twenty only) per month.
>
> 9. On every 1st July commencing 1st July, 1998 the rate of Rs.29.03 per square foot shall be revised upwards according to the living index as on that date subject, however, to a minimum increase of 9% each year.
>
> 10. With effect from the date of recording of this Compromise Agreement in Court, NPHL shall be bound and obliged to supply back-up power (one kilowatt per one hundred square feet) to BIL. BIL shall be liable to

pay to NPHL @ Rs.8 (rupees Eight only) per unit. The reading of units supplied by NPHL and consumed by BIL will be recorded in sub-meter which will be installed by NPHL at the Apartments for that purpose.

11. On every 1st July commencing 1st July, 1998 the rate of Rs.8 per unit shall be revised upwards according to the living index as on that date subject, however, to a minimum increase of 9% each year. "

8. This compromise deed was filed in the aforesaid suits along with a joint application under Order XXIII Rule 3 read with Section 151 of the Code of Civil Procedure (CPC) for passing a decree in terms of the compromise. Statement of learned counsel for the parties was recorded on 19th December, 1997 and after recording following statement order was passed in the suit:

" In view of the above statement made by the learned counsel for the parties and the contents of the documents (Ex. C-I, C-II, C-III), compromise arrived at between the parties, which is lawful, is hereby accepted. The present suit filed by the plaintiff is decreed in terms of compromise arrived at between the parties and as reflected in documents (Ex.C-I, C-II and C-III) that form part of the decree sheet.

Decree sheet be drawn up accordingly."

9. After recording to the aforesaid agreement, the company made

payment in accordance therewith, towards maintenance charges for car parking till 31st December, 2002 and recurring charges were paid till 30th June, 2003. However, thereafter the company stopped payment.

10. The case of the petitioner is that this payment is due to it. Various reminders and call notices were sent to the company to make the payments. Invoices were also raised. Outstanding amount against these payments is Rs. 30,78,371/-, details whereof are as under:

"

Particulars	Amount (Rs.)
Maintenance Charges	24,26,160.00
Maintenance charges for car parking	41,047.00
Ground Rent	57,600.00
Building Insurance	10,960.00
Sinking Fund	1,75,200.00
	27,10,967.00
Interest (up to 10th November 2003)	3,67,404.00
	30,78,371.00

"

11. However, this payment was not made by the company in spite

of statutory notice of demand dated 18th November, 2003 served upon the company under Sections 433 & 434 of the Companies Act, Instead the company, through its counsel, replied the said statutory notice on 3rd February, 2004 rejecting the claim and disputing the demands. According to the petitioner, the liability is disputed on flimsy and frivolous grounds. Therefore, present petition is filed seeking winding up of the company on the ground that it be deemed that the company is unable to pay the admitted debt.

12. The demand is refuted by the company on the ground that the same is against the provision of the Delhi Apartment Ownership Act, 1986 (hereinafter referred to as `the Act') which is applicable on all multi-storeyed buildings in Delhi, including the apartment in question and, therefore, provisions of this Act are binding on all apartment owners in view of Section 24 of the Act which specifically provides as under:

> " 24. **Act to be binding on apartment owners, tenants etc.**-(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in any contract, undertaking or other instrument and all apartment owners, tenants of owners, employees of owners and tenants, or any other person, who may, in any manner,

use the property or any part thereof to which this Act applies, shall be subject to the provisions of Act and the bye-laws and the rules made thereunder:

Provided that nothing contained in this sub-section shall affect the right, title or interest acquired by an allottee or other person in common areas and facilities from any promoter on or before the 28th day of February, 1986.

(2) All apartments, divisions and determinations lawfully made by the Association of Apartments, Owners in accordance with the provisions of this Act and the bye-laws shall be deemed to be binding on all apartment owners."

13. According to the company, the demand raised by the petitioner is illegal and contrary to the provisions of the Act. It is stated that the present petitions have been filed to coerce the company to pay staggering amount of Rs. 61,56,742/- which is not otherwise the liability of the company. Between 1997 to 2003 the company has already paid more than Rs.2.25 crores towards maintenance. However, the petitioner has not been rendering the true accounts for maintenance although it would not have spent more than Rs.40 lacs towards maintenance. Therefore, there is already a recovery of Rs.1.80 crores in excess. The rates fixed for such maintenance are unfair and arbitrary which would be clear from the

fact that maintenance charges payable in the year July, 1997 were Rs. 29.03 per sq. ft. and by addition of 8% / 9% every year, it has gone to Rs.48.37 per sq.ft. by 2002 and the company is now claiming maintenance charges and sinking fund at the rate of Rs.58 per sq. ft. per month. According to the company, the petitioner can claim maintenance charges on actual basis and cannot claim these charges by adding undue profits. It is also mentioned that the present petition is motivated and has been filed after the company had given legal notice dated 3rd February, 2004 calling upon the petitioner to execute sale deed in respect of the flats which had already been sold to the company by the petitioner. It is also the case of the company that the petitioner is harassing the company inasmuch as the company is not allowed to install dish antenna on the portion of the roof of F Block of the building although the company is specifically permitted to do so under clause 39 of the Agreement. It is further claimed that rates of maintenance in all other multi-storeyed buildings are ranging from Rs.5/- to Rs.15/- per sq. ft. depending upon AC and non-AC building.

14. Learned counsel for the company in support of the aforesaid

plea that no such charges were payable in view of the provisions of the Act, took me through various provisions of the Act.

15. Learned counsel submitted that a conjoint reading of the aforesaid provisions would clearly reveal that absolute ownership of the apartment was vested in the person who is allotted, sold or otherwise transferred the apartment and such a person is not only entitled to exclusive ownership and possession of the apartment but also entitled to such percentage of undivided interest in common areas and facilities as may be specified in the the Deed of Apartment which shall have permanent character. For maintenance of these common areas and facilities, the legislature intended that there should be an association of the apartment owners and the Administrator of the Union Territory of Delhi, namely, Lt. Governor is also under obligation to frame bye-laws in accordance with which the property is to be administered by the association of apartment owners. These bye-laws provided for various things including maintenance, repair and replacement of common areas and facilities and payment therefor as well as manner of collecting from the apartment owners or any other occupant of apartments, share of the

common expenses. His submission was that it is only this association which can demand the monies from the apartment owners. The association is further under obligation to keep proper accounts of the monies so received, expenses incurred on the maintenance and render those accounts. Whatever is surplus is to be distributed among the apartment owners as `common profits'. Thus not only such an association is required to maintain proper accounts, the underlying idea is to collect the expenses on actual basis and it is for this reason even surplus is to be refunded to the apartment owners. These were, submitted the counsel, the mandatory provisions as would be clear from *non obstante* clause appearing in Section 24 of the Act already reproduced above.

16. In this backdrop, learned counsel submitted that not only the petitioner had no right to make any such collections, in the absence of an association and till such association is formed, but even if it is presumed that the petitioner had right to collect the amounts, the petitioner was also bound by the provisions of the Act as per which it could collect the common expenses on actual basis. However, submitted the learned counsel, the Agreement provided for increase at the rate of 8% / 9% every

year whether it was required or not. Furthermore, the petitioner had never submitted any accounts to the apartment owners about the was not common expenses and common profits, if at all. In the process, the petitioner was charging much more than what was even the range of the area and had paid the entire sale consideration. In spite of purchasing the apartment the effect of the clause in the agreement asking the apartment owners to pay such charges was to treat him as even worse than tenant forcing him to cough out much more than the prevalent market rent. Such provisions were against the Act and against public policy. On this basis, learned counsel ventured to submit that even Dee of Compromise dated 17th December, 1997 was unenforceable as contrary to the provisions of the Act and violative of Section 23 of the Contract Act being opposed to public policy and, therefore, decree passed in terms of such compromise deed was also *null* and *void* as such a decree could not be passed in the teeth of mandatory provisions of the Act. Therefore, argued the learned counsel, the shelter of the Agreement, Deed of Compromise or the decree passed consequent thereto is not available to the petitioner. In support of his plea that such a decree, though it was with the consent of the parties

but in ignorance of the Act, would be nullity and in support of this proposition he relied upon the following judgments of the Supreme Court:

(i) Haji Sk.Subhan Vs. Madhorao , **AIR 1962 SC 1230.**

(ii) Smt. Kaushalaya Devi and others Vs. K.L.Bansal, **AIR 1970 SC 838.**

(iii) Sabitri Dei and others Vs. Sarat Chandra Rout and others , **(1996) 3 SCC 301.**

(iv) Dhurandhar Prasad Singh Vs. Jai Prakash University and others , **(2001) 6 SCC 534.**

(v) Chiranjilal Shrilal Goenka (Deceased) through LRs. Vs. Jasjit Singh and others **(1993) 2 SCC 507.**

17. He further submitted that once the decree was nullity, it was open for the company to take such a plea in any co-ordinate proceedings, including in the present proceedings.

18. Mr.Bhushan, learned senior counsel for the petitioner, on the other hand, argued that the claim of the petitioner was based on the decree which was passed on the basis of consent agreement entered into between the parties. Therefore, it was not open for the company to argue that the terms contained therein were onerous. A demand based on the

decree constituted the `debt'. This decree was even acted upon by the parties inasmuch as the company paid the parking charges till December, 2002 and recurring charges till June, 2003. His further submission was that the remedy, if any, for the company was in the proceedings in suit wherein decree was passed and so long as this decree was existing, it was binding on the parties. Referring to various provisions of the Lease Agreement as well as the Agreement, he argued that maintenance and recurring charges were pre-estimated charges which were approximate to the actual expenses and were integral part of the sale consideration. His submission was that while fixing the sale consideration "recurring cost" was kept in mind which were clear from clauses (14) and (21) of the Agreement. It was also made clear to the flat buyer that the payment of recurring charges was essence of the contract and the petitioner was not supposed to render any accounts therefor. In support of this submission, he relied upon the following clauses of the Lease Agreement:

> " 5 (e) The payment of recurring charges as detailed above is the essence of the contract. The lessor at no point of time has to render any account to the lessee for the actual expenses incurred by the lessor.

9 (a) The lessee is fully aware of the fact that the building in which the lessee is going to have the space is ultra modern, prestigious building and is a part of 5 Star Hotel Complex and therefore in the common interest of all the occupants of the building and to maintain a higher standard of cleanliness beauty and esthetic value and better outlook of the building certain controls and discipline shall have to be strictly observed by the lessee, his servants and occupiers.

14. In consideration of the rent herein agreed and all payments as payable to the lessor being paid by the lessee regularly and other terms and conditions and covenants being observed and performed by the lessor the lessee shall peacefully enjoy the leased premises during the said term without any interruption by the lessor.

15. As the premises is part of a 5 Star Hotel Complex, the lessor will have the complete right to keep control and supremacy at all times to come for the general management of the building and maintenance of the services as detailed in para 5 above. The lessor will have the rights to carry on the said services itself or give from time to time any contracts to any other party/agency or premises whatsoever and the lessee shall have no objection to appoint any other agency or carrying out the said services.

21 (a) The lessor reserves its rights to alter, the plans, elevation specifications, the height, width, number of floors, finishing of the building of the star category of the hotel at any time in any manner it thinks fit and proper.

(b) That without affecting the leased floor, the lessor shall always have the rights to add, demolish, construct further storeys or any structures or make any additions., alterations to the building or any portion thereof at any time before or after the completion of construction or as may be found necessary and expedient by the lessor."

19. He also relied upon the following clauses of the Agreement:

"L. AND WHEREAS this plot obtained by the Company from Delhi Development Authority on perpetual lease is of a peculiar type as distinguished from ordinary/normal commercial plots in commercial centre in as much as the outstanding special features in the entire complex is a prestigious 5 Star Hotel , including its appurtenances, basement areas open/and/or covered parking areas, exclusive common utility areas and common facilities, plant, machinery etc.which are for the exclusive use of the Hotel including part of the Complex ancillary to the Hotel and for the use of the Hotel staff, Hotel residents and other guests etc.

M. AND WHEREAS it is absolutely necessary to develop and maintain and to ensure the maintenance of the special features and facade and environments of the 5 Star Hotel.

U. AND WHEREAS even independent of the considerations mentioned in the immediately preceding paragraph, the Space Buyer has expressly agreed that the management, upkeep, replacement, maintenance etc.of the entire complex including all the common areas & facilities therein (past, present or future) shall vest absolutely and irrevocably in the Company as one of the matters of the essence of this agreement

particularly because of the peculiar responsibility of the Company for the maintenance of the hotel, its facade, surroundings and environment and for providing all necessary amenities for and connected with the Hotel.

14 a. From the date of this Agreement, the Space Buyer would be liable to pay regularly maintenance and service charges for common areas and for the consumption of electricity and water in the common areas.

b. In respect of the spaces which are air-conditions, the Space Buyer would be liable to pay the Company all charges such as for the consumption of electric and water and other consumables for the running of air-conditioning, plant, as well as for its repairs, maintenance, administrative expenses and management charges of the Company which are included in the Maintenance Charges stipulated in Annexure B thereto.

c. The Space Buyer would be liable to pay annually the sinking fund for the replacement of capital goods like air-conditioning plant, generators, machinery, electrical equipments, cables, ducting, transformers, pumping-sets, fire fighting equipment, water-mains, toilets, ventilation equipment, lifts, escalators etc.etc. The rate/s of sinking fund as payable, would be worked out separately for air-conditioned areas and non air-conditioned areas.

d. That the rate/s of general Maintenance Charges for common services, insurance and sinking fund for replacement of capital goods for the calendar year 1997 have been fixed on the basis of Living Index Points as issued by Delhi Administration in December, 1996. The

above charges will be subject to annual increase in proportion to the rate of inflation to cover the increased cost of maintenance/materials expenses etc. The annual inflation/increase will be assessed on the basis of the increase in points of Living Index as regularly issued by the Delhi Administration from time to time. The percentage of increase will be the same as the percentage of increase in the points of Living Index. Minimum increase annually would be 9 per cent on the last paid charges. The charges will be revised in the month of July every year on the basis of Living Index as issued by Delhi Administration on 31st December of the previous year and would normally be applicable for one year. The charges as applicable from 1st July, 1997 to 30th June, 1998 are given in Annexure `B' thereto.

e. The payments towards the sinking fund would be payable annually in advance and charges for maintenance of the common services and for Air-conditioning plant (wherever applicable) would be payable six monthly in advance.

f. The Company at no point of time has to render any account to the Space Buyer for the actual expenses incurred by the Company.

21. That the price of the Apartment as settled and paid in terms of this Agreement has been agreed between the company and the Space Buyer taking into consideration the rates, quantum and manner of payment of various Recurring and other charges which are to be paid by the Space Buyer as detailed in the body of this Agreement and Annexure "B" to this Agreement and also the proper discharge of the obligations cast on the buyer in terms of this Agreement.

> If at any time the Space Buyer exercises its option to bring an end to the same or have the same reduced, or the quantum of the same is reduced due to any reason whatsoever the Space Buyer would be liable to pay to the Company immediately in lump-sum as additional price an amount which would be equal to fifteen times of the amount by which the annual future liability of the Space Buyer is reduced."

20. Justifying the rates at which such maintenance and recurring charges were fixed, he submitted that by the very nature of the construction and the facilities provided which were no less than maintaining a five star hotel, the fixation of these charges was very reasonable. His further submission was that keeping in view the fact that infrastructural cost goes up every year in the form of wages/salary to the workmen/staff meant for up-keeping of the premises, increase in the cost of raw material, increase in the rates of electricity and other such items and general increase in the cost of living index, stipulation that these charges shall be enhanced every year by 8% / 9% was not at all excessive or oppressive but it was a reasonable increase provided in the Agreement. He also referred to the judgment of this Court in the case of M/s Virmani, Roy & Kutty Vs. M/s Ansal Properties & Industries Limited & Anr.

reported as **2002 (VIII) AD (DELHI) 117** in support of the plea that on some common facilities right of the buyer/promoter still remains even after sale of the apartments under the Act, as per the stipulations contained in the Agreement between the parties and following observations were relied upon:

> " Para 10: After considering the submission made by learned counsel for the parties and examining the provisions of the Delhi Ownership of Apartments Act, this court is of the considered view that the Act certainly creates valuable rights in respect of the "common areas and facilities" in multi-storeyed buildings in favour of the apartment owners so that they may enjoy their portions comfortably, but these rights are controlled by and are subject to the provisions of Section 4(3) of the Act which entitles the promoter/builder of a multi-storeyed building to specify common areas which he wishes to transfer to the flat owners. It entitles him to earmark different common areas and facilities for different occupants in the building so that different groups of the flat owners in different parts of the building may enjoy separate "common areas and facilities" without interference from other occupants of the building. This can be done by the promoter/builder of the building by incorporating appropriate Clauses regarding common areas in the Deeds of Apartments executed in favour of the purchasers of the flats in terms of Section 4(3) of the Act. Had the Legislature intended not to permit, the promoter/builder of a building to earmark or apportion such areas Section4(3) of the Act would have simply stated that every person who

becomes entitled to the exclusive ownership and possession of an apartment under Sub Section (1) or Sub Section (2) of Section 4 of the Act shall become entitled to undivided interest in all the common areas and facilities in the building and there was no need to use the words "as may be specified in the Deed of Apartment". A purchaser of the Apartment may opt out of the deal in case he finds that common areas and facilities required by him are not being provided to him by the promoter. Learned counsel for the defendants rightly contends that the roof in question still remains exclusively with defendant No.1 in as much as Clause 11(a) of the Agreement between the parties specifically provides that the promoters shall continue to have a right to make additions or put up additional structure etc.as may be permitted by the local authorities on the terrace of the complex and the terrace and parapet walls shall continue to be the property of the promoter who shall be entitled to use the same for any purpose whatsoever."

21. He further submitted that there was no association formed of the apartment owners in the building in question till date and in the absence of such association, it was for the petitioner to maintain the building and at the same time, it was the right of the petitioner to collect such maintenance and recurring charges as provided in the Agreement. He further submitted that there was no mandate of the Act that such an association has to be formed and work of maintenance could be given to third party as well. Section 15 was also silent as to who is to form this

association. He also submitted that Section 24 of the Act would neither override the decree of a competent court of law nor this Act preclude the owners to maintain the buildings, particularly in special cases as maintenance of such a state of the art building was not possible for any such association contemplated under Section 15 of the Act.

22. As the entire case hinges on the effect of the Delhi Apartment Ownership Act, 1986, it would be apposite to address that aspect of the matter first. A preamble of the Act would highlight the purpose and objective for which the Act was enacted, namely:

> " An Act to provide for the ownership of an individual apartment in a multi-storeyed building and of an undivided interest in the common areas and facilities appurtenant to such apartment and to make such apartment and interest heritable and transferable and for matters connected therewith or incidental thereto."

23. As per Section 2 of the Act, the provisions of the Act are applicable to every apartment in a multi-storeyed building which was constructed mainly for residential or commercial or such other purposes as may be prescribed. Thus, Act would clearly be applicable to the building in question. After the purchase of the space in question, the

company became the `apartment owner' as defined in Section 3(e) and had right to enjoy common areas and facilities as well. Legislature has defined limited common areas and facilities and Section 3 (q) to mean:

> "Section 3(q) : limited common areas and facilities means those common areas and facilities which are designated in writing by the promoter before the allotment, sale or other transfer of any apartment as reserved for use of certain apartment or apartments to the exclusion of the other other apartments."

24. Such ownership rights in the space in the apartment were specifically conferred by virtue of Section 4 of the Act as per which not only the company became exclusive owner and entitled to the possession of the apartment sold to it, also had right to such percentage of undivided interest in the common areas and facilities which are specified in the Agreement. Sub-Section (3) of Section 4 of the Act is as under:

> " **Sub-section (3) of Section 4**: Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub-section (1) of sub-section (2) shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the property."

25. Sub-sections (4) and (6) of Section 4 stipulate nature of undivided interest of each apartment owner in the common areas which are as under:

> " 4. **Ownership of apartments**- (4) (a) The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners;
>
> (b) the percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment, even though such interest is not expressly mentioned in the conveyance or other instrument.
>
> (6) Each apartment owner may use the common areas and facilities in accordance with the purposes for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners."

26. Whatever may be the terms of agreement, the field is admittedly covered by the statutory provisions. Indisputably, the apartment in question is covered by the provisions of the Act. Therefore, statutory provisions contained in that Act, wherever applicable, shall override the contractual terms stipulated in the Agreement signed between the parties. It is trite law that `contracting out' is not permissible in a

manner which would offend and breach the statutory provisions. To put it simply, there cannot be a clause in the Agreement between the parties which infringes statutory provision and such a clause would clearly be *void* even if the parties had agreed to the specific terms. We are concerned here with the maintenance charges. The Agreement between the parties contains clauses as per which maintenance charges are payable. However, it is to be borne in mind that the Act also deals with the subject of maintenance of these apartments.

27. `Common areas and facilities' are defined in Section 3(j) of the Act which includes land on which such building is located as well as parking areas, elevators, tanks, pumps and all other parts of property necessary or convenient to its existence, maintenance and safety, or normally in common use. Learned counsel further submitted that even the Deed of Compromise (which is given nomenclature of the Agreement in the instant case) had to contain the contents as specified in Section 13. The Act further provides for forming an association of apartment owners for the administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas

and facilities. Section 15 of the Act, which was a mandatory provision for forming such an association, stipulates as under:

> **"15. Association of Apartment Owners and bye-laws relating thereto-** (1) There shall be an Association of Apartment Owners for the administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities:
>
> Provided that where any area has been demarcated for the construction of multi-storeyed buildings, whether such area is called a block or pocket or by any other name, there shall be a single Association of Apartment Owners in such demarcated areas.
>
> (2) The Administrator may, by notification in the Official Gazette, frame model bye-laws in accordance with which the property referred to in sub-section (1) shall be administered by the Association of Apartment Owners and every such Association shall, at its first meeting, make its bye-laws in accordance with the model bye-laws so framed, and in making its bye-laws the Association of Apartment Owners shall not make any departure from, variation of, addition to, or omission from, the model bye-laws aforesaid except with the prior approval of the Administrator and no such approval shall be given if, in the opinion of the Administrator, such departure, variation, addition or omission will have the effect of altering the basic structure of the model bye-laws framed by him."

28. In sub-section (3) of Section 15, it is provided that the model

bye-laws framed under sub-Section 2 shall contain specifically the matters stipulated therein and includes:

> "(m) Maintenance, repair and replacement of the common areas and facilities and payment therefor;
>
> (n) manner of collecting from the apartment owners or any other occupant of apartments, share of the common expenses;"

29. The expenses which are to be borne for maintenance of these common areas and facilities are described as `common expenses' and defined in Section 3(k) which reads as under:

> "Common expenses means-
>
> (i) all sums lawfully assessed against the apartment owners by the Association of Apartment Owners for meeting the expenses of administration, maintenance repair of replacement of the common areas and facilities;
>
> (ii) expenses declared as common expenses by the provisions of this Act or by the bye-laws, or agreed upon by the Association of Apartment Owners.

30. Any surplus left from the monies collected from the apartment owners, after spending at common expenses is termed as `common profits' which is defined in Section 3 (l) in the following manner:

" 3(l) Common profits means the balance of all income, rents, profits and revenues from the common areas and facilities remaining after the deduction of the common expenses."

31. These common profits are to be distributed among apartment owners as mandated by Section 19 of the Act which makes the following reading:

" 19. **Common profits, common expenses and other matters.**-(1) The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest of the apartment owners in the common areas and facilities.

(2) Where the apartment owner is not in the occupation of th apartment owned by him, the common expenses payable by such apartment owner may be recovered from the person in the occupation of the apartment."

32. As already seen above, as per Section 24 of the Act provisions of the Act are binding on all apartment owners, tenants etc. notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any contract, undertaking or other instrument etc.

33. Even if it is assumed that in the absence of any association

having been formed, the petitioner has right to maintain the apartments and collect maintenance charges, what cannot be disputed is that in such circumstance the petitioner can be loosely described as the association maintaining these apartments and in any case would be bound by the aforesaid provisions including Sections 15 and 19 of the Act. Thus it would be the obligation of the petitioner to keep proper accounts of the monies so received, expenses incurred on the maintenance and render those accounts. Since there is an obligation to distribute the surplus that remains with the association/body maintaining these apartments to the apartment owners as `common profits', necessary corollary would be to maintain the premises on 'no profit no loss' basis. As a consequence, the association, and in this case the petitioner since it is maintaining the apartments, can charge only actual maintenance charges and cannot enrich itself in the process by charging over and above the expenses actually incurred. From this it will also flow, as a matter of course, that the petitioner is bound to render accounts of the monies realized from the apartment owners towards maintenance of these apartments.

34. In the instant case, the company has stated that it has already

paid a sum of Rs.2.25 crores towards maintenance between 1997 to 2003. The maintenance charges were fixed, as per the Agreement entered into in July, 1997 Rs.29.03 per sq. ft. (The submission of learned counsel for the petitioner was that by the very nature of ultra-modern construction and state of art facilities provided which are in no way less than maintaining five star hotel the fixation of these charges was very reasonable). Even if it is presumed that that was a pre-estimation of expenses which was required to be incurred on the maintenance (although this presumption may also be questionable but it it is not necessary to record any definite finding on this aspect in these proceedings), the Agreement provides enhancement of these maintenance charges by 8% / 9%every year . It is the consequence of this clause that by the year 2002 the maintenance charges had gone up to Rs.48.37 per sq.ft.and in the year 2004 the figure touched Rs.58 per sq.ft.which appears to be abnormally high. With this clause in operation and given effect to within few years maintenance charges may touch Rs.100 per sq.ft.. The owner in his apartment for which he has paid consideration is made to pay mind boggling figure of "maintenance charges" which would make him worse than a tenant as

possibly this may not even by the rent per month of the area in question. I may hasten to add that these are the tentative observations. What is highlighted is that questioning by the respondent of such maintenance charges claimed by the petitioner cannot be treated as arbitrary or without basis. It may require evidence to justify such charges claimed by the petitioner, more particularly when the company has backing of statutory provisions which cast obligation on the petitioner to render the accounts and to charge only actuals and when no such accounts are rendered and further when the charges claimed today prima facie appear to be excessive, I am afraid, that claiming charges at this rate may not be justified and, therefore, the same cannot be treated as `debt' payable by the company to the petitioner. There are genuine disputes raised by the company which need adjudication and it would not be appropriate to exercise discretionary jurisdiction.

35. Normally, when such a petition is filed on the basis of a decree, the decree would constitute a `debt' and the Company Court can proceed on that basis. It is also trite law that the decree holder can file winding up petition without seeking execution of such a decree. [See

Silver Shield Construction & Trading Ltd. Vs. Recondo Ltd. reported as **(1994) 15 Corporate Law Adviser 92 (Bombay)** and Tube Investment Of India Ltd. and another Vs.Everest Cycles Ltd. reported as **(1984) 56 Comp Cases 165.]**

36. However, it does not follow that as a matter of routine the Company Court is to act upon such a decree treating it as a debt and also presume that the company against which a petition for winding up is filed on the basis of such a decree is unable to pay the debt since the payment as per the decree is not made. It is open for the court to examine further question as to whether, in a given case, the debt is bona fide disputed and notwithstanding the said decree there are valid reasons available to the respondent not to pay the amount under a decree and validity of the decree is questioned. Indepth consideration is given to this aspect by the Calcutta High Court in the case of Bajrangbali Engineering Co.Ltd. Vs. Amar Nath Sircar and others reported as **(83) 1995 Comp Cases 435** as would be clear from the following discussion in the said judgment:

> " Mr.P.K.Das, appearing for the company appellant while challenging the order of admission of the winding

up petition in the court below, has cited several decisions for the proposition that the existence of a money decree is not necessarily conclusive for the company court to proceed query to be raised thereupon. The following cases were cited in this regard:

Ko Ku La Ltd., In re [1953] 23 Comp Cas 81; AIR 1953 Cal 387, Fraser, In re [1892] 2 QB 633, 638, Official Receiver v.Abdul Shakoor, AIR 1965 SC 920, 924, Om Prakash Mohta V.Steel Steel Equipment and Construction Co.P.Ltd. [1968] 38 Comp Cas 82 (Cal); [1967] Comp LJ 172.

It is an undeniable proposition of law which emerges from these cases that the civil court granting the decree does not thereby bind either a court in bankruptcy or a winding-up court. The rationale is that a debt, which succeeds in the causing of a declaration of bankruptcy, or in the causing of initiation of the process of winding-up of a company, enures to the benefit or prejudice of not only the creditor in question, but of all other creditors and contributories, as the case might be, and at the same time causes civil death of the individual bankrupt or the wound up company, again, as the case might be, third parties are involved. Thus, the winding up court goes behind the decree wherever serious questions are raised about the decree having been obtained by fraud or collusion, or where there is a serious allegation about the lack of jurisdiction of the court passing the decree, or where a serious miscarriage of justice might, according to the winding-up court, occur, if the decretal debts were permitted to be used as a tool for winding up.
Bankruptcy courts and winding-up courts are courts of representative action. Individual interests are adjudged

not in isolation but as having a bearing upon other interests too, not all of which are at all times represented before the court judging the particular matter in hand. The official liquidator, the principal subordinate officer of the company court, does not admit to proof decretal debts which might have been collusively suffered by the company for unwarranted gain of the corporate managers. No official liquidator can disallow a debt which has been treated by the company court itself as so indisputable as to cause the admission and advertisement of a winding up petition. Thus, the company court scrutinizes with double caution the debt which is to be the beginning of the end.

It has been held in Fraser, In re [1892] 2 QB 633 that even if an application to have a judgment in a civil suit set aside has been refused, and the said refusal has been affirmed in the Court of Appeal, even in that case, the decretal dues can be gone behind by the company court. So also in the case of even a consent judgment in Lennox, In re [1885] 16 QBD 315. It has also been held that even in unconditional leave to defend an action has been granted, the company court might yet admit a winding-up application on the said same debt; Welsh Brick Industries Ltd., In re [1946] 2 All ER 197 (CA).

The position at law well settled both in England and in India, therefore, is that a winding-up court on its own goes behind the decree in the aforesaid serious circumstances, and if it is itself dissatisfied, then it does not permit a winding-up application to proceed, leaving the parties to work out their rights in execution proceedings in the ordinary civil courts."

37. I had occasion to consider this aspect in the case of EX SUD

LIMITED VS. INDIAN ALUMINIUM CABLES LIMITED in CP No. 216/1993 wherein judgment was rendered on 28th February, 2005. That was a case where the winding up petition was filed on the basis of a foreign decree. After referring to the aforesaid judgment of the Calcutta High Court and some other judgments, I brushed aside the arguments of the petitioner in the said case that this court could not go into the question about the validity of the decree with reference to Section 13 of the Code of Civil Procedure and summed up the legal position in this manner:

> "Assaying the law in the aforesaid perspective, questions formulated above can be answered as under:
>
> Winding up petition filed on the basis of a foreign decree would be maintainable. It is not necessary for a decree holder, in possession of a foreign decree, to first execute the decree by filing execution and get the validity of such a decree determined on the touchstone of Section 13 of the CPC. However, it is not to say that when such a petition is filed, the court is precluded from making any further probe and proceed on the assumption that the debt is payable on the basis of the said decree. Rather, in such proceedings, it would be open to the company to show that even if it is a `debt' the same is disputed *bona fide*. Debt payable under a decree can be challenged on the plea that the decree is obtained by fraud etc. As a sequittar when decree is passed by a foreign court, the judgment debtor/company will have right to demonstrate that such a decree is

obtained by fraud or is not binding as it offends any of the provisos contained in Section 13 of the CPC. If the argument of learned senior counsel for the petitioner is accepted, it can have far-reaching consequences and the provision for winding up could be misused by obtaining a decree fraudulently, not getting it executed and filing winding up petition and converting it to a coercive mean of extracting money which may otherwise be not payable. Necessarily, therefore, the petitioning creditor will have to meet the challenge of the judgment debtor/company when validity of the said decree is questioned on such grounds. I may hasten to add that it is not that while examining such issue, frivolity of the respondent company is to be entertained. However, the minimum which the Company Court would be required to do is to test the defence/submission of the company from the point of view germane to these proceedings, namely, whether the debt is disputed on *bona fide* grounds. In the context of a foreign decree, that would mean going into the said decree with reference to Section 13 of the CPC to find out whether only plausible defence is raised which needs examination. Otherwise, the effect would be to shut the very remedy available to such judgment debtor if execution petition is filed and it would lead to denial of natural justice."

38. In the instant case, when the consent decree was passed it was only on the basis of Agreement between the parties.

39. However, the moot question would be as to what is the binding nature of a consent decree passed in ignorance of the statutory provisions. Direct on the point is the judgment of the Supreme court, namely, Smt.

Kaushalaya Devi (supra). That was a case where a petition under Section 13 of the Delhi and Ajmer Rent Control Act, 1952 was filed for ejectment of the tenant. A decree was passed by the court, in those proceedings, in terms of compromise but without satisfying itself if the grounds of eviction existed. This decree was held to be in contravention of Section 13 of the Act and termed as nullity which could not be executed. Sikri, J (as his Lordship then was) speaking for the court, observed as under:

> " 5. The High Court, on revision, held that the decree was a nullity as the Order passed on the basis of the compromise did not indicate that any of the statutory grounds mentioned in Section 13 of the Act existed. In Bahadur Singh's case, Civil Appeals Nos.2464 and 2468 of 1966, D/-16-10-1968= (reported in (1969) 1 SCWR 51) this Court held that the decree passed on the basis of an award was in contravention of Section 13(1) of the Act because the Court had passed the decree in terms of the award without satisfying itself that the ground of eviction existed. Bachawat, J., speaking for the Court, observed that "on the plain wording of Section 13(1) the Court was forbidden to pass the decree. The decree is a nullity and cannot be enforced in execution." This Court, accordingly, declared inter alia that "the decree in so far as it directs delivery of possession of the premises to the landlord is nullity and cannot be executed."
>
> 6. The present case is also governed by the provisions of Section 13(1) of the Act and, as we have said before, this

> appeal must fail, in view of the judgment of this Court in Bahadur Singh's case, Civil Appeals Nos.2464 and 2468 of 1966, D/-16-10-1968= (reported in (1969) 1 SCWR 51). In the result the appeal is dismissed but there will be no order a to costs."

40. Indubitably when a decree is passed by a court which lacked inherent jurisdiction, such a decree is nullity and its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for the right even at the stage of execution or in any collateral proceedings.[See Sushil Kumar Mehta Vs. Gobind Ram Bohra, **(1990) 1 SCC 193** and Sabitri Dei and others Vs. Sarat Chandra Rout and others , **(1996) 3 SCC 301].** In the present case although it cannot be said that the court lacked inherent jurisdiction when a consent decree was passed between the parties. However, admittedly the provisions of that Act were not brought to the notice of the court and such a decree, even if it is a consent decree, might not have been passed in view of the provisions of the said Act, as already noted above. In the case of Dhurandhar Prasad Singh (supra), the Supreme Court has gone to the extent of holding that if a decree is passed in ignorance of provision of law, such a decree would

be inexecutable. No doubt, a distinction is to be maintained between a `void' decree and an `illegal, incorrect or irregular ' decree. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est* and *void ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. However, a mere wrong exercise of jurisdiction does not result in nullity. It would be merely an illegal order/decree not passed in accordance with the procedure laid down by law. In case it is illegal, incorrect of irregular decree, the only remedy is to get it set aside. [See: Rafique Bibi (Dead) by Lrs. Vs. Sayed Waliuddin (Dead) By Lrs. And others, **(2004) 1 SCC 287** and Balvant N.Viswamitra and others Vs. Yadav Sadashiv Mule (Dead) through Lrs. and others, **(2004) 8 SCC 706.**]

41. Therefore, I am of the opinion that in the facts and

circumstances of the present cases, the petitioner be not allowed to file winding up petition on the basis of decree passed and consent terms inasmuch as while approving the consent terms and passing decree thereon, this court was not informed, nor was there any occasion for the court to consider the provisions of the Act. Thus while holding that it is not a case where discretionary jurisdiction be exercised, at the same time, to balance the equities it would be proper to give certain directions to the company inasmuch the company cannot be allowed to create a situation where it does not pay any maintenance charges at all. No doubt the petitioner is to render the accounts as well.

42. These petitions are, therefore, disposed of with the following directions:

(i) The company shall pay maintenance charges at the rate of Rs.29.03 per sq.ft. which were the charges agreed to in July, 1997. I am conscious of the fact that the company even thereafter paid increased maintenance charges after adding 8% / 9% every year till 2003, still I am restricting the payments, for time being, at Rs.29.03 per sq.ft. as the company claims that it has already paid huge amount in excess and the

accounts are to be rendered by the petitioner.

(ii) The petitioner, if on rendition of accounts, is able to show that amount payable is more than Rs.29.03 per sq.ft.it would be entitled to make claim of further maintenance charges for the period in question.

(iii) Both the parties would be at liberty to seek their civil remedies, namely, the petitioner for claiming the maintenance charges at enhanced rate, if justified on actual basis and the company for claiming rendition of accounts.

43. The parties shall bear their own costs.

May 9 , 2005.
mk

(A.K. SIKRI)
JUDGE

R.S.

Certified that the corrected copy of the judgment has been transmitted in the main server.